

FAMILY COURT OF AUSTRALIA

TIMS & SAV

[2007] FamCA 1167

FAMILY LAW – MARRIAGE – DECREE OF NULLITY – husband claims that wife was lawfully married to another person at time of their marriage – wife resides in Cambodia - no attendance by wife or filing of answering documents – service effected - husband filed decision of Migration Review Tribunal which found that the wife was lawfully married to another person at the time the parties married in Australia – application granted.

Marriage Act 1961 (Cth)

APPLICANT:	MR TIMS
RESPONDENT:	MS SAV
FILE NUMBER:	ADC 3499 of 2007
DATE DELIVERED:	29 August 2007
PLACE DELIVERED:	Adelaide
JUDGMENT OF:	Strickland J
HEARING DATE:	29 August 2007

REPRESENTATION

COUNSEL FOR THE APPLICANT:	Ms Finnie
SOLICITOR FOR THE APPLICANT:	Westside Community Lawyers Inc.
COUNSEL FOR THE RESPONDENT:	No appearance

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ORDERS

- (1) The marriage solemnised at Adelaide on ... January 2001 between the parties is declared to be absolutely null and void.
- (2) That the Application for Final Orders filed by the applicant on 27 June 2007 be dismissed and removed from the active pending cases list.

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2. IT IS NOTED IN CONNECTION WITH THESE ORDERS that the judgment of the Honourable Justice Strickland delivered this day will for all publication and reporting purposes be referred to as *Tims & Sav*.

(13)

FILE NUMBER: ADC 3499 of 2007

MR TIMS
Applicant

And

MS SAV
Respondent

EX TEMPORE REASONS

3. I have before me an Application for Final Orders filed by the husband on 27 June 2007 in which he seeks a decree of nullity of the marriage on the ground that the marriage is void. The particular ground that is relied upon is that at the time of the marriage the wife was lawfully married to another person. The evidence relied upon in support of the application is an affidavit filed by the husband on 27 June 2007.
4. This matter originally came before me on 15 August 2007, when I indicated that I was not prepared to hear the matter at that stage because there was no proof of service of the application and the affidavit upon the wife, and I adjourned the matter to today.
5. In that regard I now have before me an affidavit of service of the husband's solicitor, which tells me that the documents were sent to the wife's address in Cambodia on 27 June 2007 by registered post.
6. The wife has now sent back, both by facsimile and by letter, an acknowledgment of service. The acknowledgment of service is not dated, but on the facsimile copy, it has a fax stamp which indicates it was sent on 16 August 2007. I am also told from the bar table that it was received in the husband's solicitor's offices yesterday.

7. Ms Finnie tells me that what happened was that the wife did not originally send the acknowledgment of service back. I am told that the husband's daughter-in-law, who was in Cambodia, spoke to the wife about this and the wife acknowledged that she had received the documents.
8. Since the adjourned hearing date, I am told that the husband has telephoned the wife and requested her to send back the acknowledgment of service, and that has now occurred.
9. Given all that, I am satisfied that service has been effected. I am also satisfied that the wife has had ample opportunity to file answering documents and/or attend, or arrange for representation, at this hearing. She has not done any of that.
10. In terms of establishing the ground, the relevant date of course is when the husband and the wife were married in Australia, and that was in January 2001. By "relevant date" I mean that to establish the ground the husband has to satisfy me that at that time the wife was lawfully married to another person.
11. The evidence, as I say, is contained in the affidavit of the husband, and relevantly that tells me that on 28 March 2001 the wife, who was in Cambodia at the time - and I assume that was because it was necessary for her to be there to make the application - made an application for a spouse visa to reside in Australia with her husband. That application was rejected on 20 November 2001, and the reason it was rejected was that the delegate of the Minister who made the decision found that the marriage between the husband and the wife was not a valid marriage because both parties remained legally married to their first spouses. Not necessarily relevant to this application, but the delegate also was not satisfied that the review applicant - that is the husband - and the visa applicant - that is the wife - met the criteria with respect to de facto spouses and, also not relevant to this hearing but for completeness, the delegate determined that the parties had failed to demonstrate that they had a genuine and continuing relationship.
12. A primary reason for the delegate's decision in relation to the marital status of the wife was that, in the wife's visa application, she had declared a prior spousal relationship with a Mr L that commenced on 1 January 1977 and ended by a break-up on 5 July 1977.

13. The delegate also found that the husband was legally married to another person, and that was on the basis of an answer to a question in the wife's visa application where it was stated that he - the husband - had had a prior relationship with a Ms K Sav, who is no relation to the wife in these proceedings, and I will refer to that again in a moment. However, I am primarily concerned with the marital status of the wife at the date of the marriage of these two parties in Australia.
14. In any event, on 12 February 2002 the husband lodged an application for review of that decision with the Migration Review Tribunal, and on 29 August 2003 the tribunal upheld the decision of the delegate and the application was rejected. Without going into all of the detail of that, I have before me the statement of decision and reasons by the Migration Review Tribunal, and it seems from that that the tribunal considered that the visa applicant - namely, the wife - was legally married to Mr L, according to Cambodian law, and remained so. There was no evidence presented to persuade the tribunal otherwise.
15. There was no evidence before the tribunal that indicated that the marriage between the wife and Mr L had been dissolved or annulled and it had not been claimed that either event had occurred. On that basis, and referring to Section 23B of the *Marriage Act 1961*, which states that, "*A marriage is void if either of the parties is, at the time of the marriage, lawfully married to some other person,*" the tribunal found that the husband and the wife were not in a married relationship for the purposes of the definition of a spouse in the relevant regulation upon which the visa application was based.
16. I am told by Ms Finnie that, in relation to the husband's position - and, again, it is not necessarily relevant for my purposes today - the tribunal found that the husband was in a de facto relationship with the person referred to earlier in these reasons as Ms K Sav and that they were not in a marriage relationship.
17. Of course, I am not bound by the decision of the Migration Review Tribunal, but it is still evidence that I can receive and act upon in this matter. Significantly, what happened subsequent to the decision of the Migration Review Tribunal is that the wife applied for and obtained a divorce from her first husband in Cambodia. That occurred on 9 January 2004. Why that was done, of course, was that the wife still wished to pursue a visa application to

join her husband in Australia, but she needed obviously to be divorced from her first husband before that could be proceeded with. I am told that after that divorce a further application was prepared but it was never filed, and eventually the parties separated in 2005. Thus the wife's application to come to Australia was not proceeded with.

18. Thus, two primary pieces of evidence on which I am being asked to make the orders sought are the decision of the Migration Review Tribunal and obviously the factual basis of that, which is the wife declaring in her visa application that she, in effect, was married previously; and, secondly, the fact of the wife seeking and obtaining a divorce in Cambodia.
19. On that basis, I find that at the time of this marriage - namely, January 2001 - the wife was lawfully married to another person and thus that this marriage is void. On that basis I am prepared to grant a decree of nullity of the marriage between the parties entered into in January 2001.

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I certify that the preceding
17 numbered paragraphs are
a true copy of the reasons herein of the
Honourable Justice Strickland.
The 29th day of August 2007.

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Associate

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